No. 76-1456

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM ROBERT KLEIN, PETITIONER

v.

DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the judgment of the court of appeals affirming his disbarment by the district court.

1. On December 16, 1964, state disciplinary proceedings, charging seven acts of misconduct (see Pet. App. C, pp. 38-40), were commenced against petitioner. Petitioner challenged the lawfulness of those proceedings in several respects but did not deny the charges (*id.* at 32-33). On June 29, 1965, petitioner was disbarred by order of the Appellate Division of the New York Supreme Court. The opinion of the court indicated that its order may have rested not only on petitioner's failure to controvert the charges, but also in part on consideration of certain misconduct not previously charged against petitioner.

Petitioner's motion to vacate on grounds of lack of notice was granted to the extent of allowing him to serve an amended answer to the charges and referring the matter to a referee for further hearing (*id.* at 33-34). *Matter of Klein*, 24 App. Div. 2d 726.

Before any hearing was held, petitioner appealed the order of disbarment (which had not been vacated) to the New York Court of Appeals. Disregarding the portion of the Appellate Division's opinion indicating consideration of charges of which petitioner had had no notice, the court of appeals affirmed, stating that petitioner had received an opportunity to be heard but had raised no triable issues (Pet. App. C, p. 34). *Matter of Klein*, 18 N.Y. 2d 598, 272 N.Y.S. 2d 372, 219 N.E. 2d 194. This Court denied certiorari *sub nom. Klein* v. *Klein*, 385 U.S. 973, rehearing denied, 385 U.S. 1032, motion to file a second petition for rehearing denied, 388 U.S. 925.

Hearings were conducted before a referee pursuant to the Appellate Division's earlier order. Petitioner challenged the referee's qualifications and declined to attend. The referee heard evidence *ex parte* and found that three and one-half of the charges against petitioner were supported. The Appellate Division confirmed his report and denied petitioner's motion to vacate the order of disbarment (Pet. App. C, p. 35). *Matter of Klein*, 28 App. Div. 2d 538, 279 N.Y.S. 2d 579.

On the basis of the state court order, the United States District Court for the Southern District of New York thereupon entered its own order of disbarment against petitioner (Pet. App. C, p. 31a). Petitioner was notified and given opportunity to object. Following a hearing, the district court overruled petitioner's objections and declined to vacate the order (*id.* at 32). The court of appeals summarily

affirmed (Pet. App. B, p. 30), and denied petitioner's request for rehearing or rehearing *en banc* (*id.* at 31).

2. Contrary to petitioner's claims, neither the proceedings leading to his disbarment by the state court, nor the procedures followed here by the district court, were constitutionally infirm. Petitioner had full opportunity to deny the charges against him in the state court proceedings, but he declined to do so, relying instead on various legal objections that the Appellate Division overruled (see Pet. App. C, pp. 32-33). Even assuming that that court's decision was in fact tainted by partial reliance on charges of which petitioner had no notice, that aspect of its decision was disregarded by the New York Court of Appeals in affirming the order of disbarment (see page 2, *supra*). Moreover, petitioner was thereafter afforded a new opportunity to contest the charges against him, but again declined to do so when his challenge to the qualifications of the referee was overruled. In these circumstances, petitioner cannot complain of any lack of due process in the state court proceedings.

Nor did the proceedings before the district court deny petitioner due process. Rule 5(d) of the Rules of the District Court for the Southern District of New York[1]

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[1]Rule 5 of the United States District Court for the Southern District of New York provides in pertinent part:

> (d) Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline

conforms in every respect to the principles this Court established in *Selling* v. *Radford*, 243 U.S. 46. Petitioner had full notice of the substantive charges upon which his earlier state court disbarment was based,[2] and it was his burden to demonstrate that that disbarment furnished an inadequate basis for disbarment in the federal court. See 243 U.S. at 51-52. As the district court correctly ruled, petitioner failed to discharge that burden and his disbarment from the federal court was accordingly proper.[3]

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by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.

Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney or a bar association designated by the chief judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this Paragraph (d).

[2]Thus *Fuentes* v. *Shevin*, 407 U.S. 67, upon which petitioner relies (Pet. 15-16), is distinguishable.

[3]Petitioner inaccurately states (Pet. 14) that the District Court for the Eastern District of New York agrees with him that the state court disbarment proceeding was subject to "constitutional infirmities." Disbarment proceedings against petitioner were commenced in the Eastern District, but were then suspended when the United States Attorney declined the court's invitation to act as the prosecuting party. In dismissing the proceedings without prejudice, the district court referred to "[t]he *prima facie* validity of the state disbarment, and the utter and manifest unsoundness of the [petitioner's] due process and other procedural contentions * * *" (*In the Matter of the Application to Discipline William Robert Klein*, E.D. N.Y., No. 65-M-811, decided June 25, 1969).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.